Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1977

DOCKET NO. 77-268

FLOTA MERCANTE GRANCOLOMBIANA, S.A.,

Petitioner,

against

VANA TRADING CO., INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE UNITED STATES, FOR THE SECOND CIRCUIT

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FLOTA MERCANTE GRANCOLOMBIANA, S.A.,

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VANA TRADING CO., INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE UNITED STATES, FOR THE SECOND CIRCUIT

Flota Mercante Grancolombiana, S.A. (hereinafter "Flota"), prays that a writ of certiorari issue to review that part of the final judgment of the United States Court of Appeals for the Second Circuit, entered on May 20, 1977 which failed to apply the doctrine of proportionate fault, and incorrectly granted Respondent judgment against Petitioner.

Citations to Opinions Below

The opinion of the United States District Court for the Southern District of New York was reported at 415 F. Supp. 884 (1976) and is printed in the Appendix hereto, *infra*, page 1a).

The opinion of the Court of Appeals for the Second Circuit has not been officially reported as yet, and is printed in the Appendix hereto, *infra,* page 12a.

Jurisdiction

The decision of the United States Court of Appeals for the Second Circuit is dated May 20, 1977.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

Questions Presented

1. Did the Court of Appeals for the Second Circuit err by not applying the doctrine of proportionate fault as between Petitioner and Respondent as the District Court had done.

2. (a) Did the Court of Appeals err in not dismissing Respondent's complaint once Petitioner had established the statutory defense of insufficiency of packing.

(b) Did the Court of Appeals err by not applying the holding of the *Niel Maersk,* 91 F. 2d 932 (2 Cir., 1937), cert. denied 302 U.S. 753 (1937), rather than *Schnell* v. *Vallescura,* 293 U.S. 296 (1934), since it was found by the District Court that the yams were in a susceptible condition at the time of shipment and no causal connection between any act of the carrier and the damage to the yams was established.

Statutory Provisions Involved

This case involved 46 U.S.C. 1304 (2) (m) and (n) Carriage of Goods by Sea Act (COGSA) which provide as follows: "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(n) Insufficiency of packing".

Statement of the Case

Respondent, Vana Trading Co., Inc. (hereinafter "Vana") delivered to Petitioner, Flota, for carriage from Cartagena to New York aboard the S.S. METTE SKOU, a cargo of yams individually wrapped in newsprint type paper and packed in cardboard boxes with only two hand holes in each box and a slit for ventilation. The cargo of yams arrived in New York in a damaged "cooked" condition.

The District Court found that at the time of shipment the yams were in a condition susceptible to damage. It further found that Petitioner had established the defense of insufficiency of packing. However, because the District Court found that other factors contributed to the damage, it thereby divided the total damages evenly between Petitioner and Respondent applying the doctrine of proportionate fault.

The Court of Appeals for the Second Circuit reversed the judgment of the District Court holding that the District Court's apportionment of damages was inappropriate in a maritime cargo damage situation. Despite the District Court's finding after trial that the yams were improperly packed the Court of Appeals awarded the Respondent its full damages stating that the Petitioner had failed to satisfy its burden of proving what percentage of damage was attributable to each party.

Reasons for Granting the Petitioner a Writ of Certiorari

Re: The first question presented: Did the Second Circuit err in not applying the doctrine of proportionate fault?

A concept of apportioning damages in cargo cases in theory not a new one has been as a practical matter an impossible concept to implement. As the cases of *Schnell* and *Niel Maersk, supra,* illustrate, two or more parties are frequently responsible to some degree for damage to cargo, but the party who bears the shifting burden of proof, be it plaintiff or defendant, as a practical matter inevitably also bears the entire responsibility for the loss. The difficulties in trying to prove with any precision what factors caused a perishable commodity to spoil are readily apparent. In effect the party assigned the burden of separating damages is being assigned a judgment against it. The *Schnell, supra* and *Niel Maersk, supra,* cases are again instructive since in neither case was the party assigned the burden of proof, in one instance the shipper and in the other the carrier, able to satisfy the virtually impossible burden of separating damages.

The District Court, though it failed to dismiss Respondent's complaint, recognized the difficulty of separating damages in a situation involving several potentially liable parties and multiple causal factors contributing to the damage. The District Court borrowed heavily from this Court's decision in *United States* v. *Reliable Transfer Co.,* 421 U.S. 397 (1975) in deciding that both Respondent and Petitioner contributed to the damage, but because it was not possible to measure precisely the comparative degree of their fault the damages should be allocated equally.

Though the *Reliable, supra,* holding involved a collision and stranding situation the logic of the decision is readily adaptable to the cargo damage area. It is Petitioner's firm belief that the *Reliable* holding should be extended to

cargo damage actions so that when two or more parties contribute to the damage of a cargo the liability would be allocated among the parties proportionately according to the comparative degree of their fault.

This suggested holding is precisely the one advanced by the District Court herein, and is a legal theory that finds deep-rooted support not only in *Reliable, supra,* but in this Court's decision in *Cooper Stevedoring Co.* v. *Kopke Inc.,* 417 U.S. 106 (1974), as well. Though *Cooper, supra,* involved a maritime personal injury it delineated this Court's thinking on division of damages and proportionate fault in admiralty cases in explicit terms. In upholding the division of damages between the vessel and the stevedore determined by the trial court and affirmed by the Fifth Circuit, this Court held,

> "• • • that the apparent prohibition against contribution in noncollision maritime cases announced in *Halcyon* and *Atlantic* was inapplicable where the joint tortfeasor against whom contribution is sought is not immune from tort liability by statute."

The Court also spoke in *Cooper* in more general language, language that both foreshadowed and fully supports the trial court's apportioning of damages in the cargo damage situation now being considered. At page 110, Mr. Justice Marshall wrote:

> "• • • Even though the common law of torts rejected a right of contribution among joint tortfeasors the principle of division of damages in admiralty has, over the years, been liberally extended by this Court in directions deemed just and proper. In one line of cases, for example, the Court expanded the doctrine to encompass not only damage to the vessels involved in a collision, but personal injuries and property damage caused innocent third parties as well. • • • Indeed, it is fair to say that application of the rule of division of

damages between joint tortfeasors in admiralty cases has been as broad as its underlying rationales. The interests of safety dictate that where two parties 'are both in fault, they should bear the damage equally, to make them more careful.' *The Alabama, supra,* at 697. And a 'more equal distribution of justice' can best be achieved by ameliorating the common-law rule against contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame."

By using such strong sweeping language this Court was clearly anticipating and laying the groundwork for its holding in *Reliable, supra,* and the District Court's application of the proportionate fault doctrine to a cargo situation herein.

Having applied the proportionate fault doctrine to non-collision maritime cases in *Cooper, supra,* this Court then took the next logical step in *Reliable,* by extending the doctrine to collision and stranding situations.

It is significant to note that *Reliable,* like *Cooper,* was a reaction to a seemingly unbending precedent of Maritime Law, to wit, damages in a collision case being borne equally by the parties at fault regardless of the degree of their fault. In a unanimous decision this Court in *Reliable* replaced this harsh doctrine, the governing law since *The Schooner Catherine* v. *Dickinson,* 58 U.S. 170 (1854), with the more modern, practical and most importantly, more equitable proportionate fault doctrine. It is time that the area of maritime cargo damage itself governed by ancient harsh doctrines, also be re-examined and infused with modern legal thinking by this Court.

The Second Circuit while recognizing that this case represented an invitation to apply to cargo damage cases the doctrine of proportionate fault as set forth in *Cooper* and *Reliable,* declined to do so. (See Appendix, Page 13a,

paragraph 1). The Second Circuit instead chose to rely upon *Schnell, supra.* Petitioner suggests that the reliance on the *Schnell* rule by the Second Circuit in 1977 was misplaced and patently unfair to litigants in cargo damage cases, just as *The Schooner Catherine, supra,* was unfair to litigants in collision cases.

Petitioner notes initially that the *Schnell* decision in 1934 predates by two years the passage of the Carriage of Goods by Sea Act (COGSA). Since the passage of the COGSA this Court has not considered the issue of proportionate fault in cargo cases.

Surely an issue of such importance to the shipping industry warrants definitive clarification by the Supreme Court in light of COGSA and the continuous development and modernization of maritime law since *Schnell* was decided.

The patent unfairness of *Schnell,* is seen in this quote at page 306,

"Where the state of the proof is such as to show that the damage is due either to an excepted peril or to the carrier's negligent care of the cargo, it is for him to bring himself within the exception or to show that he has not been negligent.

"Similarly, the carrier must bear the entire loss where it appears that the injury to cargo is due either to sea peril or negligent stowage, or both, and he fails to show what damage is attributable to sea peril."

According to *Schnell,* the carrier must bear the entire loss any time it cannot prove what portion of the damages it was responsible for. To accurately separate damages, as has been previously discussed, is in most cases impossible. In the instant case the possible causes of damage were many and varied; the length of time the yams remained in the ground long after maturity, subjecting the

yams to attacks by rodents, insects and other vermin, inherent vice, improper wrapping and packing, improper storage while awaiting shipment, and others. Even the most sophisticated battery of expert witnesses could not give conclusive testimony when confronted with such a myriad of possible causal factors. To apply such a doctrine as *Schnell,* whereby the party forced to sustain the burden of proof has virtually no chance of success is totally inequitable. That the burden of separating the causes of damage is equally as difficult for the shipper is evidenced by the shipper's failure to do so in *Niel Maersk, supra.*

The situation exemplified by the instant case is a frequent one in the vast number of cargo damage cases that are litigated each year in the Federal Courts. The issue involved is one of paramount importance to the maritime industry, shippers and marine underwriters. A definitive ruling by this Court is called for pursuant to Supreme Court Rule 19 (1)(b), and in light of the passage of COGSA and the more than forty (40) years of modernization and change in the maritime industry since the Court's holding in *Schnell, supra.*

Re: The second question presented: Did the Second Circuit err in not dismissing Respondent's complaint after Petitioner had established the defense of insufficiency of packing?

(a) Both the District Court and the Court of Appeals erred in not dismissing Respondent's complaint once Petitioner had proved to the satisfaction of the trial court the defense of insufficiency of packing.

The defense of insufficiency of packing is a statutory one, 46 U.S.C. 1304 (2) (n), and Petitioner contends it is a defense intended by Congress as a total defense to the carrier in cargo damage situations. The finding by the District Court that the yams were insufficiently wrapped and packed alone dictated a dismissal. The failure to dismiss Respondent's complaint given a finding by the trial court that the yams were insufficiently packed represents a misapplication and misinterpretation of both a Federal Statute and Federal Maritime Law by the District and Circuit Courts.

Did the Second Circuit err by not applying the doctrine of *Niel Maersk?*

(b) One of the most objectionable points of the decisions of the District and Circuit Courts was the finding that Respondent had satisfied its burden of proving the good order and condition of the cargo, even though it was established that the yams were both improperly packed and in a susceptible condition at the time of their shipment. This incongruous finding was made and upheld even though the District Court realized that Respondent had the burden of showing that its perishable cargo was free of latent defects, *J. Howard Smith, Inc.* v. *S.S. Maranon,* 501 F. 2d 1275 (2d Cir. 1974), *cert. denied,* 420 U.S. 975 (1975). The Respondent clearly did not carry this burden in that the yams were found to be both improperly packed and in a susceptible condition for reasons apart from the packing at the time of shipment.

Both the District and Circuit Courts then compounded this erroneous finding by inappropriately applying *Schnell, supra,* to a situation that should have been governed by the *Niel Maersk, supra. Schnell* is inapplicable to the instant case, because it involved a case where the good order and condition of the cargo at the time of shipment was never disputed. The *Niel Maersk,* conversely, involved preshipment cargo damage aggravated by the fault of the vessel, and resulted in the shipper's complaint being dismissed. The instant case, therefore, should be governed by *Niel Maersk* rather than *Schnell,* for it too involves cargo that was not in good order at the time of shipment. Additionally, the Respondent was actively neg-

ligent in improperly wrapping and packing its cargo, a factor not present in *Niel Maersk, supra.* This additional factor makes the present situation an even stronger case for dismissal of the Respondent-Shipper's complaint than *Niel Maersk* itself.

The crucial difference in the application of either *Schnell* or *Niel Maersk* is, of course, which party must carry the burden of proof as to separating damages caused by the cargo's condition and acts of the shipper, and those due to the fault of the vessel. Though Petitioner adamantly denies any fault on its part, nevertheless, it was reversible error by the Courts below to apply *Schnell, supra,* and assign Petitioner the burden of separating damages, a burden correctly belonging to Respondent under the governing case law, to wit, *Niel Maersk,* because of the susceptible condition and the improper packaging of the cargo at the time of shipment.

The District and Circuit Courts after erroneously assigning Petitioner the burden of separating the damages, compounded their error further by holding Petitioner liable for negligent stowage. There was never established any evidence of such negligence or causal connection between the damage to the yams and any act of Petitioner.

The District Court itself conceded, when discussing the various possible causal factors of the damage, that, "any of the circumstances alone probably would not have resulted in the damage." This is a clear admission by the Trial Court that no proximate cause between the stowage of the yams and the damage was shown. There was therefore, no proof of negligence on the part of Petitioner, nor any evidence connecting any act of the Petitioner with the damage to the yams. Petitioner contends that to find it negligent without proof of proximate cause is reversible error. As the Second Circuit per Judge Friendly stated in *Lekas and Drivas, Inc.* v. *Goulandris* (306 F. 2d 425) (2

Cir. [1962]) in considering a cargo damage action where several factors contributed to the damage,

> "Whether stowage of some of the cheese in the poop was improper for the Gibraltar voyage is thus immaterial; if the accident would have happened without defendant's negligent act, then such is not the cause of it." (p. 430)

The *Lekas,* case, *supra,* represents the clear-cut law that a finding of liability against a carrier requires both proof of a causal connection between the cargo damage and a negligent act by the carrier, yet in the instant case a finding of liability against Petitioner was made without proof of either.

As has been demonstrated under this heading the District and Circuit Courts misapplied and misinterpreted a Federal Statute and Federal Maritime Law in failing to dismiss Respondent's complaint, a failure that should be rectified by this Court.

CONCLUSION

For the foregoing reasons this Petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A, Findings and Opinion by Milton Pollack, U.S.D.J.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

75 Civ. 1278 (MP)
#44733

VANA TRADING CO., INC.,

Plaintiff,

v.

S.S. "METTE SKOU", her engines, boilers, etc., and FLOTA MERCANTE GRANCOLOMBIANA, S.A.,

Defendants and
Third Party Plaintiffs,

v.

OVE SKOU and INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third Party Defendants.

FINDINGS AND OPINION

MILTON POLLACK, District Judge.

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Appendix A, Findings and Opinion by Milton Pollack, U.S.D.J.

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Appendix A, Findings and Opinion by Milton Pollack, U.S.D.J.

This admiralty cargo suit was brought by Vana Trading Co. (hereinafter "Vana") against the S/S Mette Skou and its time-charterer, Flota Mercante Grancolombiana S.A. (hereinafter "Flota") for alleged damage and loss to a shipment of 5,000 cartons of Colombian yams. Flota impleaded the owner of the vessel, Ove Skou, and the stevedoring company at New York, International Terminal Operating Co., Inc. (hereinafter "I.T.O.") as third party defendants.

The S/S Mette Skou was time chartered by Flota from her owner, Ove Skou, on a Time Charter form approved by the New York Produce Exchange, with some changes, which was dated April 26, 1974.

The yams in question were shipped late in the season from Colombia, South America. They had matured in November or December 1973, months before shipment, but were not shipped at that time. Instead, they were allowed to remain in the ground from November or December 1973 until they were harvested in March 1974. After harvesting, they remained in the storage sheds before they were finally packed into the cardboard cartons used for shipping.

On June 15, 1974, the yams were individually wrapped in unprinted newspaper and packed into the cardboard boxes which contained only two hand holes and a slit for ventilation. The yams were trucked to Cartagena, Colombia. After storage in a government warehouse, they were brought to the pier on June 18, or 19, 1974, subsequent to the vessel's arrival.

When the Mette Skou arrived at Cartegena, the Charterer informed the vessel's officers that the Charterer had booked 5,000 cartons of yams. At that time, only the deep tanks on the vessel were empty and available for cargo. The shipper examined the deep tanks and the ventilation system which serviced the deep tanks, and

did not object to the storage of the yams in the deep tanks.

At the time that the yams left Cartegene, Colombia, defendant Flota delivered to the shipper's forwarding agent a bill of lading numbered 1, dated at Cartegena, Colombia, June 1974 and signed by Flota's authorized Cartegena Agents, which recited receipt in apparent good order and condition of the 5,000 cartons of yams consigned to the order of Vana at the Port of New York. The Bill of Lading was executed by Flota's authorized Cartegena agents on behalf of Flota; and for and on behalf of the Master of the S/S Mette Skou. The Instituto Colombiano Agropecurio of the Republic of Colombia's Ministry of Agriculture issued a certificate stating that the yams were found to the best of the inspector's knowledge to be substantially free from injurious diseases and pests, and were believed to conform to the current phytosanitary regulations of the United States.

The proof showed that the shipment together with two other shipments of yams were loaded aboard the S/S Mette Skou, under deck and stowed in the port and starboard No. 3 hatch deep tanks at the direction of the Master.

The cartons of yams were stowed 10-13 tiers high with 2x4's between every third tier. The cartons were set out about eight to nine inches from the wings of the tanks with air channels both fore and aft and athwart ship each about six to ten inches wide. Ventilation was provided by two six inch service pipes which extend at the sides to the main deck. The electrically-operated ventilation system for the deep tanks was run continuously through the entire voyage until the yams were discharged at New York.

When the vessel arrived in New York on July 1, 1974 at 0700 hours request was made by the vessel's officers to the Charterer, Flota, and to I.T.O., the defendant steve-

dore, to being discharge of the yams immediately after arrival. New York was experiencing a heat wave at the time. However, Flota and I.T.O. failed to being discharge of the cargo until July 2, 1974. After discharge the cartons were placed in I.T.O.'s warehouse, which was not adequately ventilated.

The yams were delivered by I.T.O. on behalf of Flota in a damaged and cooked condition. At the time of delivery the yams exhibited excessive heat, moisture, sprouting and tissue breakdown. The plaintiff claimed that it attempted to sell the yams to various wholesale dealers but was unsuccessful because the yams were damaged and decayed. The plaintiff also claimed that it dumped the yams but the evidence was inconclusive, concerning the extent of the dumping involved.

Pursuant to the terms of the charter party, the Charterer had the entire responsibility and authority for the load, stow and trim of the cargo under the supervision of the Captain. The charter party did not warrant or express that the No. 3 deep tanks were suited for the carriage of yams, and as between the owner of the vessel and the Charterer, the decision to load yams in the No. 3 deep tanks was ultimately made by the Charterer. The participation of the officers of the vessel in the loading was as the agents for the Charterer Flota, and not for the owner. *Nichimen Co.* v. *M.V. Farland,* 462 F.2d 319 (2d Cir. 1972); *International Produce, Inc.* v. *S.S. Frances Salman,* 1975 A.M.C. 1521 at 1544-5 (S.D.N.Y. 1975).

The evidence satisfactorily establishes that the ship was not unseaworthy; that ventilation was not warranted in the charter party but in fact existed and that the ventilation was appropriate in the deep tanks for the shipment of merchantable cargo delivered on board in good condition, properly packed and wrapped. Consequently, the third

party claim of Flota against Ove Skou cannot be sustained and is to be dismissed with costs to be assessed against Flota. Ove Skou is entitled to recover legal expenses the amount of which has been agreed upon by the parties to be $9,036.24.

Plaintiff must, in order to make out a prima facie case against Flota, the Charterer, prove by a preponderance of the credible evidence that the yams were delivered to the vessel in good order and condition. *North American Steel Products Corp.* v. *Andros Mentor,* 1969 A.M.C. 1482 (S.D.N.Y. 1967). The burden is on the plaintiff to show that the perishables were free of latent pathological disease or injury. *J. Howard Smith, Inc.* v. *S.S. Maranon,* 501 F. 2d 1275 (2d Cir. 1975), *cert. denied,* 420 U.S. 975 (1975). That burden was carried by the plaintiff, since the preponderance of the credible evidence, including the testimony of experts and others who inspected the yams in New York, as well as the proof concerning the condition and handling of the yams in Colombia, demonstrated that the damage suffered by the cargo was caused by the conditions to which it was subjected in transit, and not by any inherent defects.

There is a suggestion from the defendants that the yams may nonetheless have suffered from some inherent vice and it is unclear that they did not. However, no finding can be made that there was inherent vice. The most that can be said is that the yams were in susceptible conditions for the results which followed their preparation for shipment, stowage, transportation, delayed discharge, warehousing and delivery. What happened in the packing and handling of the yams after their collection for transportation gives a firmer inference of the basis of the damage occasioned.

The yams had been packed in cartons that may be described as non-breathing and had been wrapped in newsprint, an unsuitable wrapping for such a commodity, which

produced a cooking effect. They were then stowed in the deep tanks some 13 tiers high and subjected to a measure of heat which caused the yams to continue the cooking process and decay. Any of these circumstances alone probably would not have resulted in the damage. Their combination, together with the conduct of I.T.O. as hereafter indicated, brought on the destruction of the yams to the major extent that has been established. Thus, the damage was due to a combination at least of the circumstances created or contributed to by the shipper and the charterer and was enhanced by the manner of performance of I.T.O. of its obligations.

In removing the cartons and storing them until delivery, I.T.O. negligently destroyed further quantities of the commodity by its harsh handling in the removal causing the collapse of cartons and damage to contents and by the subsequent unventilated storage of the commodity until delivery to the consignee. I.T.O. thereby contributed to and aggravated the fault assessable against Flota in a measurable amount but here again, one that can only be estimated.

When there is concurrent fault in the fashion described, the loss occasioned thereby does not entitle a shipper to whom some of the fault is attributable to claim a recovery for the full value as a premium for the fault. The rule is clear that when two or more parties have contributed by their fault to cause property damage in a maritime cargo situation, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault and that liability for such damage is to be allocated equally only when the parties are equally at fault or when it is not possible fairly to measure the comparative degree of their fault. *See United States* v. *Reliable Transfer Co.,* 421 U.S. 397, 411 (1975); *Selcamerica, Inc.* v. *S.S. Barberbrook,* 390 F. Supp. 462 (S.D.N.Y. 1975).

Appendix A, Findings and Opinion by Milton Pollack, U.S.D.J.

The Court is called upon to fix the damages under the well-settled rule that where there are wrongdoers and there is uncertainty, the risk of the uncertainty which wrong has created will be resolved from the circumstances in the best way possible by the trier of fact. *See Perma Research & Development Co.* v. *Singer Co.*, No. 75-7362 (2d Cir. July 1, 1976). Such a resolution has been applied in the admiralty context. *See, e.g., Petition of M/V Elaine Jones*, 480 F.2d 11, 23-24 (5th Cir. 1973), *modified on other grounds*, 513 F.2d 911, *cert. denied*, 423 U.S. 840 (1975).

In connection with that doctrine, the liability of I.T.O. to Flota represents a claim over by Flota to the extent that I.T.O. contributed to the damage. It does not increase the amount of the plaintiff's claim but is an element in determining the comparative fault of Flota and I.T.O.

At the suggestion of the Court, the parties sought to determine and fix the respective liability. They have stipulated and agreed among themselves, without prejudice to their rights of appeal from all adverse rulings of the Court as to any party (including the allocations of fault implicit in the amounts referred to hereafter) that the total compensable loss involved to the consignee was $78,358.50. They have also agreed that the degree of fault allocable to each party cannot be determined to a mathematical certainty from the evidence, and in accordance with the rule of damages stated by the Court, the plaintiff and defendant have consented to divide the damages equally subject to the aforementioned appeal by which Flota will claim that it does not owe the award. This results in a recovery by the plaintiff in accordance with the stipulation of the parties of $39,179.25 which shall be inclusive of interest but subject to costs against the defendant Flota. Finally, the defendant Flota and third-party defendant I.T.O. have agreed that the latter's liability should be assessed at $1,000 which shall be inclusive of interest but subject to costs in favor of Flota.

Appendix A, Findings and Opinion by Milton Pollack, U.S.D.J.

To summarize, judgment of dismissal is to be entered on behalf of Ove Skou as against Flota and it shall recover its expenses and counsel fees which are agreed to amount to the sum of $9,036.24 inclusive of interest and costs.

The plaintiff, Vana Trading, shall recover against Flota the sum of $39,179.25 with costs to be taxed and Flota in turn shall recover against I.T.O. the sum of $1,000 with costs to be taxed.

The parties entitled to such recoveries shall have execution therefor.

The foregoing together with the decision of May 19, 1976 shall constitute the findings of fact and conclusions of law required by Fed. R. Civ. P. 52 (a).

So Ordered.

July 9, 1976.

Milton Pollack
U.S. District Judge

Appendix B, Judgment of District Court.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

75 Civil 1278 (MP)
#76,673

VANA TRADING CO., INC.

Plaintiff

—against—

S.S. "METTE SKOU", her engines, boilers, etc., and FLOTA MERCANTE GRANCOLOMBIANA S.A.

Defendants and
Third Party Plaintiffs,

—against—

OVE SKOU and INTERNATIONAL TERMINAL OPERATING CO., INC.

Third Party Defendants

7/22/76—9:15 A.M.—No apperance in opposition. Bill of Costs as taxed in the sum of $451.71, in favor of plaintiff Vana as against defendant Flota, and added to the judgment.

Clerk

The issues in the above entitled action having been brought on regularly for trial, before the Honorable Milton Pollack, United States District Judge, on May 17, 18, 19 and 20, 1976, and at the conclusion of the evidence

the Court having reserved decision, and the Court thereafter on July 9, 1976, having handed down its opinion, constituting its findings of fact and conclusions of law, it is,

ORDERED, ADJUDGED and DECREED: That the Third party complaint as to third party defendant Ove Skou be and it is hereby dismissed, and that Ove Skou shall recover its expenses and counsel fees against defendant/third party plaintiff Flota Mercante Grancolombiana, S.A., in the amount of $9,036.24, inclusive of interest and costs, and it is further,

ORDERED, ADJUDGED and DECREED: That plaintiff Vana Trading Co., Inc., have judgment against defendant Flota Mercante Grancolombiana, S.A., in the amount of $39,179.25, with costs to be taxed, and it is further,

ORDERED, ADJUDGED and DECREED: That defendant/third party plaintiff Flota Mercante Grancolombiana, S.A., have judgment against third party defendant International Terminal Operating Co., Inc., in the amount of $1,000, with costs to be taxed.

Dated: New York, N.Y.
July 13, 1976

RAYMOND F. BURGHARDT

Appendix C, Opinion of Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 547, 679, 986, 987—September Term, 1976.

(Argued March 11, 1977 Decided May 20, 1977.)

Docket Nos. 76-7386, 76-7393, 76-7417 and 76-7446

VANA TRADING CO., INC.,

Plaintiff-Appellee-Cross-Appellant,

—against—

S.S. "METTE SKOU", her engines, boilers, etc., and FLOTA MERCANTE GRANCOLOMBIANA, S.A.,

Defendant-Third-Party Plaintiff-Appellant-Appellee

—against—

OVE SKOU and INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third-Party Defendants-Appellees-Cross-Appellants.

Before:

J. JOSEPH SMITH and WILFRED FEINBERG, *Circuit Judges* and CHARLES H. TENNEY, *District Judge.**

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* United States District Judge for the Southern District of New York, sitting by designation.

Appendix C, Opinion.

PURRINGTON & MCCONNELL, New York, N.Y. (John Hay McConnell and Stephen A. Agus, of counsel), *for Plaintiff-Appellee-Cross-Appellant, Vana Trading Co., Inc.*

RENATO C. GIALLORENZI, New York, N.Y., *for Defendant-Third-Party Plaintiff-Appellant-Appellee, Flota Mercante Grancolombiana, S.A.*

HAIGHT, GARDNER, POOR & HAVENS, New York, N.Y. (Chester D. Hooper, Vincent M. De Orchis and M. E. DeOrchis, of counsel), *for Defendant-Appellee Ove Skou.*

HILL, RIVKINS, CAREY, LOESBERG & O'BRIEN, New York, N.Y. (Martin B. Mulroy and Bruce J. Hector, of counsel), *for Third-Party Defendant-Cross-Appellant-Appellee,* International Terminal Operating Co. Inc.

TENNEY, *D.J.:*

This admiralty cargo suit involves the damage and loss to a shipment of yams. It also represents an invitation to apply to cargo suits the doctrine of proportionate fault recently made applicable to collision and stranding cases by *United States* v. *Reliable Transfer Co.*, 421 U.S. 397 (1975), an invitation which we decline.[1]

Suit was brought by Vana Trading Co., Inc. ("Vana"), the consignee of the yams, against the S.S. Mette Skou

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[1] We decined a similar invitation in *Reliable Transfer Co., Inc.* v. *United States*, 497 F.2d 1036 (2d Cir. 1974), *rev'd*, 421 U.S. 397 (1975), for reasons equally applicable to the instant case.

and her time-charterer, Flota Mercante Grancolombiana, S.A. ("Flota"). Flota impleaded the owner of the vessel, Ove Skou ("Skou"), and the stevedoring company at New York, International Terminal Operating Co. Inc. ("I.T.O.") as third-party defendants.[2] After trial District Judge Milton Pollack held on the evidence that the loss was caused by a combination of circumstances attributable to Vana, the consignee, to Flota, the time-charterer, and to I.T.O., the stevedore. *Vana Trading Co., Inc.* v. *S.S. Mette Skou,* 415 F. Supp. 884, 887 (S.D.N.Y. 1976). He further held that allocation of liability for damages proportionate to each party's comparative degree of fault was appropriate. Accepting the parties' agreement "that the degree of fault cannot be determined to a mathematical certainty," *id.* at 888, Judge Pollack confirmed the allocation of damages contained in that agreement without prejudice to their rights of appeal with respect to such allocation.[3] Finding the allocation between Vana and Flota improper, we reverse.

The facts and findings as developed on the trial are as follows. The S.S. Mette Skou was time chartered from her owner, Skou, on a New York time charter form dated April 26, 1974. The form contained the usual clause 8 which made the captain and crew the borrowed servants of the charterer, Flota, and not servants of the shipowner, Skou, for the purpose of loading, stowing and discharging cargo

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[2] Vana's complaint lay *in personam* against Flota under the bill of lading contract signed by Flota's Cartegena agents; the owner Skou appeared *in personam* in response to Flota's third-party complaint as did I.T.O. No *in rem* action or jurisdiction is involved herein.

[3] The total loss was stipulated as $78,358.50. The parties stipulated that these damages should be divided equally between Flota and Vana—$39,179.25 each—and that Flota was entitled to a recovery against I.T.O. of $1,000. Judge Pollack confirmed this apportionment. 415 F. Supp. at 888.

on the ship. When the Mette Skou arrived at Cartagena, Colombia in mid-June 1974, Flota advised the vessel's officers that Flota had booked 5,000 cartons of yams. These yams had matured in November or December 1973 but were allowed to remain in the ground from that time until they were harvested in March 1974, after which they remained in stowage sheds until June 15, 1974 when the shipper, Exportadora Andina Ltda. ("Andina") individually wrapped them in unprinted newspaper and packed them into cardboard boxes which contained only two hand holes and a slit for ventilation. They were then trucked to Cartagena, stored in a government warehouse and delivered to the pier on June 18 or 19, 1974, subsequent to the vessel's arrival. At that time only the deep tanks and several 'tween decks on the vessel were empty and available for cargo. The shipper, Andina, examined the deep tanks and the ventilation system servicing them and did not object to the storage of the yams in the deep tanks.

The shipment involved herein, together with two other shipments of yams, were loaded aboard the S.S. Mette Skou under deck and stowed in the port and starboard No. 3 hatch deep tanks at the direction of the Master. The cartons were stowed 10-13 tiers high with 2 x 4's between every third tier. The cartons were set out about eight to nine inches from the wings of the tanks with air channels both fore and aft and athwart ship, each about six to ten inches wide. Ventilation was provided by two six-inch service pipes which extended at the sides to the main deck. The electrically-operated ventilation for the deep tanks was run continuously through the entire voyage until the yams were discharged at New York.

At the time the yams left Cartagena, Flota delivered to Andina's forwarding agent a bill of lading dated June 19, 1974, executed by Flota's Cartagena agents both on behalf of Flota and for and on behalf of the Master of

the vessel, which acknowledged receipt in Colombia of the 5,000 cartons of yams in apparent good order and condition and stated that they were consigned to the order of Vana at New York.[4] The Instituto Colombiano Agropecuario of the Republic of Colombia's Ministry of Agriculture issued a certificate stating that the yams, to the best of the inspector's knowledge, were substantially free from injurious diseases and pests, and were believed to conform to the current phytosanitary regulations of the United States.

Although the S.S. Mette Skou arrived in New York on the morning of July 1, 1974, Flota and I.T.O. failed to begin discharge of the yams until July 2, 1974, despite a request by the vessel's officers that discharge begin immediately after arrival. Furthermore, after discharge, the cartons were placed in I.T.O.'s warehouse, which was not adequately ventilated. When the yams were delivered to Vana by I.T.O. on behalf of Flota they were in a damaged and cooked condition, exhibiting excessive heat, moisture, sprouting and tissue breakdown.

Judge Pollack concluded on the basis of the foregoing that the third-party claim of Flota against Ove Skou, the owner of the vessel, should be dismissed with costs assessed against Flota. We agree. The trial judge found that the officers of the vessel participated in the loading of the cartons of yams as agents for Flota, and not on behalf of the shipowner. He further found "that the ship was not unseaworthy; that ventilation was not warranted in the charter party but in fact existed and that the ventilation was appropriate in the deep tanks for the shipment of merchantable cargo delivered on board in good condition, properly

[4] A clean bill of lading in the case of packaged goods merely attests to apparent good condition of cargo, based on external inspection. *United States* v. *Lykes Bros. Steamship Co., Inc.*, 511 F.2d 218, 223 (5th Cir. 1975).

packed and wrapped." 415 F. Supp. at 887.[5] On the record we find no reason to disturb these findings or his legal conclusion. *Nichimen Co.* v. *M.V. Farland,* 462 F.2d 319 (2d Cir. 1972); *International Produce, Inc.* v. *S.S. Frances Salman,* 1975 A.M.C. 1521, 1544-45 (S.D.N.Y. 1975).

We cannot agree, however, with the trial court's allocation of liability between Vana and Flota. On this issue, we read Judge Pollack's opinion as holding that there was no inherent vice in the yams and that they were delivered to the vessel in good order and condition, free of latent pathological disease or injury. 415 F. Supp. at 887. Although Judge Pollack stated that "[t]he most that can be said is that the yams were in susceptible condition for the results which followed their shipment, stowage, transportation, delayed discharge, warehousing and delivery," *id.,* such a condition does not amount to an inherent vice. The Supreme Court has accepted a jury charge defining the latter term as "'any existing defects, diseases, decay or the inherent nature of the commodity which will cause it to deteriorate with a lapse of time.'" *Missouri Pacific R.R.* v. *Elmore & Stahl,* 377 U.S. 134, 136, 138-39 (1964).[6] By using the term "susceptible" in this context Judge Pollack would seem to have meant only that the yams were particularly able to be affected by the conditions under which they were packed, stowed and unloaded and not that

[5] Had the trial court found the ship unseaworthy due to a faulty or improper ventilation system, there is authority for an equal division of damages as between the owner and the charterer. *International Produce Inc.* v. *S.S. Frances Salman,* 1975 A.M.C. 1521, 1546-47 (S.D.N.Y. 1975).

[6] The *Missouri Pacific* case was decided under the Interstate Commerce Act rather than COGSA. Nevertheless, the fungibility of the definition of inherent vice is indicated by the *Missouri Pacific* Court's use of a quotation from *Schnell* v. *The Vallescura* to support one part of its holding. 377 U.S. at 138 n.7, *quoting* 293 U.S. 296, 305-06 (1934).

their condition was such that they would have deteriorated merely through "a lapse of time." Moreover, Judge Pollack found that "the damage suffered by the cargo was caused by the conditions to which it was subjected in transit, and not by any inherent defects," and that "the damage was due to a combination at least of the circumstances created or contributed to by the shipper and the Charterer and was enhanced by the manner of performance of I.T.O. of its obligations." 415 F. Supp. at 887. Specifically, the shipper's packing of the yams—"which produced a cooking effect"—and the charterer's stowage of the yams —"which caused the yams to continue the cooking process and decay"—combined, along with the conduct of I.T.O., to cause the damage. *Id.*

The primary problem concerns the trial court's reliance on the Supreme Court's recent decision in *United States* v. *Reliable Transfer Co., supra,* which extended the doctrine of proportional fault to property damage in maritime collisions and stranding cases, and its failure to apply the correct rule for apportioning damages as determined by the Supreme Court over forty years ago in *Schnell* v. *The Vallescura,* 293 U.S. 296 (1934).[7] As was stated in

[7] Although *Schnell* v. *The Vallescura* was decided before the passage of COGSA in 1936, the rule of the case has been restated and followed often in the Second Circuit since that time. *J. Gerber & Co.* v. *S.S. Sabine Howaldt,* 437 F.2d 580, 588 (2d Cir. 1970); *Lekas & Drivas, Inc.* v. *Goulandris,* 306 F.2d 426, 431-32 (2d Cir. 1962); *Great Atlantic & Pacific Tea Co.* v. *Lloyd Brasileiro,* 159 F.2d 661, 665 (2d Cir.), *cert. denied,* 331 U.S. 836 (1947); *Armco Int'l Corp.* v. *Rederi A/B Disa,* 151 F.2d 5, 8 (2d Cir. 1945); *Edmond Weil, Inc.* v. *American West African Line, Inc.,* 147 F.2d 363, 366-67 (2d Cir. 1945); *Pioneer Import Corp.* v. *The Lafcomo,* 138 F.2d 907, 908 (2d Cir. 1943), *cert. denied,* 321 U.S. 766 (1944); *Wessels* v. *The Asturias,* 126 F.2d 999, 1001 (2d Cir. 1942).

David Crystal, Inc. v. *Cunard S.S. Co.,* 223 F. Supp. 273, 287 (S.D.N.Y. 1963), *aff'd,* 339 F.2d 295 (2d Cir. 1964):

> "There is no rule in cargo damage cases which requires the damages to be either equally apportioned among the parties negligent as in mutual fault collision cases . . . or to be proportioned among the parties at fault as in maritime personal injury cases. . . ."

The Court's action in *Reliable Transfer Co.,* while bringing the rule in collision cases into line with that in personal injury cases, does not alter this situation.

Under Sections 3-4 of the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. §§ 1303-04, a consignee or shipper such as Vana who wishes to recover against the carrier for damage to goods bears the initial burden of proving both delivery of the goods to the carrier, in this case Flota, in good condition, and outturn by the carrier or by the stevedore, for whose conduct the carrier is responsible, in damaged condition. *M.W. Zack Metal Co.* v. *S.S. Birmingham City,* 311 F.2d 334, 337 (2d Cir. 1962), *cert. denied,* 375 U.S. 816 (1963). The trial court found that Vana had sustained that burden, and we do not find this to be "clearly erroneous." *McAllister* v. *United States,* 348 U.S. 19, 20 (1954).[8]

[8] There was evidence in the form of the certificate by the Instituto Colombiano Agropecuario of the Republic of Colombia Ministry of Agriculture (stipulated to by both Vana and Flota) and testimony by the chief officer of the vessel and by the shipper, Andina's general manager, that the cargo at time of shipment was in good order and condition. However, the consignee's burden does not mean that it must always introduce direct evidence that the cargo was in good condition when shipped. It may additionally meet its burden by showing, as was also done here, from the condition of the cargo as delivered or otherwise, that the damage was caused by the carrier's negligence and not by any inherent vice in the cargo. *Elia Salzman Tobacco Co.* v. *S.S. Mormacwind,* 371 F. 2d 537, 539 (2d Cir. 1967).

When the consignee has proved its prima facie case, the burden shifts to the carrier to show that the loss or damage falls within one of the COGSA exceptions set forth in 28 U.S.C. § 1304(2).[9] *J. Gerber & Co.* v. *S.S. Sabine Howaldt,* 437 F.2d 580, 588 (2d Cir. 1971); *see Schnell* v. *The Vallescura, supra,* 293 U.S. at 303. Flota satisfied that burden according to the trial judge in that he found that the yams had been packed in "non-breathing" cartons in "unsuitable wrapping for such a commodity" thus establishing the section 1304(2)(m) exception, "insufficiency of packing." 415 F. Supp. at 887.

Once a COGSA exception is established, the burden then returns to the shipper or consignee to "show that there were . . . concurrent causes of loss in the fault and neglect of the carrier." *J. Gerber & Co.* v. *S.S. Sabine Howaldt, supra,* 437 F.2d at 588; *Lekas & Drivas, Inc.* v. *Goulandris,* 306 F.2d 426, 431-32 (2d Cir. 1962); *see Schnell* v. *The Vallescura, supra,* 293 U.S. at 305. The court below found that Vana had sustained this further burden by showing that the stowage of the yams some thirteen tiers high within the deep tanks, subjecting them "to a measure of heat," was a concurrent cause of the loss.[10] 415 F. Supp. at 887. Defendant I.T.O. was also found to be at fault for its harsh handling of the cargo

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[9] It is not necessary for us to reconsider the question whether, under COGSA and circumstances such as those presented by this case, the carrier has the burden of proving inherent vice under 46 U.S.C. § 1304(2)(m) or the shipper has the burden of disproving that exception as a part of the requirement that it must establish the good condition of the goods upon delivery of the carrier. *See, e.g., Hecht, Levis & Kahn, Inc.* v. *The S.S. President Buchanan,* 236 F.2d 627, 631 (2d Cir. 1956). As was discussed in the text above, we read the trial court's opinion as holding that it was established that the yams suffered from no inherent vice.

[10] This improper stowage, which was chargeable to Flota, is not a type of negligence by the carrier which is an excepted cause under COGSA. *See, e.g.,* 28 U.S.C. § 1304(a)(2).

and for subjecting the yams to unventilated storage following discharge. *Id.* The negligence of I.T.O. is imputed to Flota but is recoverabe by Flota in indemnity.

All the previous burdens being satisfied, the final burden rested with Flota to show what ascertainable amount of the damage was attributable to the packaging, from which it was excepted, and what was due to the improper stowage and negligent stevedoring, which were not excepted and for which Flota was chargeable. Failing this burden, Flota was chargeable with the entire loss *Schnell* v. *The Vallescura, supra,* 293 U.S. at 306; *J. Gerber & Co.* v. *S.S. Sabine Howaldt, supra,* 437 F.2d at 588.

Rather than determining ultimate liability according to Flota's success in satisfying this burden of separating the damage, however, the trial court stated:

> "The rule is clear that when two or more parties have contributed by their fault to cause property damage in a maritime cargo situation, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault and that liability for such damage is to be allocated equally only when the parties are equally at fault or when it is not possible fairly to measure the comparative degree of fault." 415 F. Supp. at 888, *citing United States* v. *Reliable Transfer Co., supra,* 421 U.S. at 411.

Except for the substitution of the words "cargo situation" for the words "collision or stranding" this is virtually the precise language of *Reliable Transfer Co.* In that case, the Court overruled the ancient and harsh maritime collision and stranding rule of equal apportionment regardless of actual degree of fault, a rule which did not apply in cargo cases such as that currently on appeal. Indeed, this area of maritime law has been governed for some forty years by a rule which does allow for apportionment ac-

cording to relative degree of fault, although an occasional harsh result may arise, as when the carrier is unable to sustain its final burden of proving the relative degree of fault. In such a case the carrier must bear all the damages even though it has been established that those damages were in part caused by occurrences for which it is excepted from liability. Nevertheless, the rule of *Schnell* v. *The Vallescura,* clearly stated and frequently applied, must govern in this case.

The trial court was unable to make a finding as to the allocable percentages of the degree of fault, nor is there any support for such a finding in the record. *Cf. Tri-Valley Packing Ass'n* v. *States Marine Corp.,* 310 F.2d 891, 894 (9th Cir. 1962). The parties agreed as between themselves, and the trial court concurred, that an exact apportionment could not be made and that, in accordance with the *Reliable Transfer Co.* rule quoted above, Vana and Flota would divide the damages equally, with Flota entitled to indemnification in the amount of $1,000 from I.T.O. 415 F. Supp. at 888. The parties having reserved their right to appeal such allocation, we hold that, according to the rule of *Schnell* v. *The Vallescura,* Flota must bear the full amount of damages of $78,358.50, an amount for which we find adequate support in the record. We do not disturb the $1,000 indemnification award since it is unrelated to the trial court's application of a rule which we find to be in error in a maritime, noncollision cargo damage case.

Accordingly, the judgments against Flota and Vana must be reversed, and the causes are remanded to the district court with directions to enter judgment for plaintiff Vana against defendant Flota for the full amount of its damages, with costs to Vana and Skou against Flota both below and on this appeal.

Appendix D, Order of Reversal of Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twentieth day of May one thousand nine hundred and seventy-seven.

Present: Hon. J. Joseph Smith

Hon. Wilfred Feinberg,
Circuit Judges

Hon. Charles H. Tenney,
District Judge

76-7386

Vana Trading Co., Inc.,
Plaintiff-Appellee-Cross-Appellant

v.

S.S. "Mette Skou", her engines, boilers, etc., and Floata Mercante Grancolombiana, S.A.,
Defendant-Third-Party
Plaintiff-Appellant-Appellee,

v.

Ove Skou and International Terminal Operating Co., Inc.,
Third-Party Defendants-Appellees-Cross-Appelants.

Appendix D, Order of Reversal.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is reversed and the action be and it hereby is remanded to said District Court for further proceedings with costs to be taxed against defendant-third-party-plaintiff-appellee-appellee Floata Mercante in accordance with the opinion of this court.

A. Daniel Fusaro
Clerk

By: Arthur Heller
Deputy Clerk